IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 78-31

DAVID JOHNSON - - - - - - Petitioner

versus

HENRY MEIGS, Judge - - - - - Respondent

On Writ of Certiorari to the Supreme Court of Kentucky

RESPONSE TO PETITION

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INDEX

TABLE OF AUTHORITIES

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Supreme Court of Kentucky was filed on May 2, 1978, in *Johnson* v. *Meigs,* Ky., File No. 78-SC-179-MR. (See Appendix.)

QUESTIONS PRESENTED

Although Petitioner has posed two questions in the petition, Respondent believes that the Petition validly presents only one issue for the Court's consideration, to wit:

> WHETHER THE DECISION OF THE SUPREME COURT OF KENTUCKY IN *JOHNSON* v. *MEIGS,* FILE NO. 78-SC-179-MR, IS CORRECT.

CONSTITUTIONAL PROVISIONS

Petitioner has sought to invoke the Fifth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT

Petitioner and Dwight Davis were indicted for armed robbery and for the murder of the robbery victim. Petitioner drove Davis to a restaurant where Davis stole a sum of money and shot and killed the manager of the restaurant. Davis then left the restaurant and made his escape in Petitioner's car. (Petitioner remained in the car during the robbery.) Petitioner was indicted under Kentucky's complicity statute, KRS 502.020. (See Appendix.)

Following Petitioner's trial by jury in the Franklin Circuit Court on November 7, 1977, the jury returned a verdict of not guilty on the charge of murder but could not agree upon a verdict on the charge of armed robbery. Thereupon the trial court dismissed the indictment to the extent of the murder charge and declared a mistrial as to the robbery charge.

Petitioner then moved, in the trial court, for dismissal of the robbery charge. Failing at this endeavor, Petitioner thereafter sought unsuccessfully a writ of prohibition in the Court of Appeals of Kentucky (*Johnson* v. *Meigs,* Ky. App., No. 78-CA-27-OA (Order entered February 23, 1978)) in order to prevent his being retried for the charge of armed robbery. (See Appendix.)

Petitioner's next step was to appeal the decision of the Court of Appeals of Kentucky to the Supreme Court of Kentucky, from where he prosecutes this application for writ of certiorari.

ARGUMENT

The Decision Below Is Correct.

Petitioner argues that the decision of the Supreme Court of Kentucky is incorrect because the decision is contrary to KRS 505.040 (see Appendix) and because the decision runs afoul of the Fifth and Fourteenth amendment protection against double jeopardy.

The provisions of KRS 505.040 do not apply to the instant proceeding. The cited statute applies to circumstances involving sequential prosecutions for different offenses. Because the second prosecution for robbery differs only from the murder portion of the first prosecution, the analysis of the applicability of KRS 505.040 must be confined to the murder aspects of the first trial and to the second trial for robbery alone.

Although the first trial, for the offense of murder, resulted in an acquittal, the offense of robbery is not an offense of which Petitioner might have been convicted insofar as the murder aspect of the first trial is concerned. (KRS 505.040(1)(a).) Neither will any other sub-section of KRS 505.040 entitle Petitioner to the relief sought.

The cases cited by Petitioner are distinguishable from the instant case and are therefore inapplicable.

In *Ashe* v. *Swenson,* 397 U. S. 436 (1970), six men were robbed at the same time by several gunmen. Ashe was charged with six counts of robbery. Following trial for the robbery of one victim Ashe was acquitted. He was thereafter tried for, and convicted of, the robbery of a second victim. On a subsequent collateral attack this Court held that the second trial violated Ashe's Fifth Amendment double jeopardy rights. Because of the nature of the case, the only fact which was ever really in issue was whether Ashe was one of the gunmen. When the jury acquitted Ashe at the first trial, the jury validly, and finally, determined that Ashe was not one of the gunmen and, coincidentally, that he could not have robbed any of the victims. The verdict at the first trial constituted a determination of every fact necessary to a decision in the second trial. Because every fact necessary to convict at the second trial had been litigated and had been validly and finally determined during the first trial, the Double Jeopardy Clause prevented re-litigation of those facts by the same parties. *Turner* v. *Arkansas,* 407 U. S. 366 (1972), and *Harris* v. *Washington,* 404 U. S. 55 (1971), are, similarly, distinguishable from the case at bar both in law and in fact.

In the case at bar the instructions of the trial court required a determination of three facts regarding the murder charge and three facts regarding the robbery charge. (See Appendix.) The two sets of facts are not identical.

To convict of murder the jury was required to believe all of the following facts:

1. That petitioner promoted or facilitated the robbery;
2. That the restaurant manager was killed; and,
3. That petitioner wantonly engaged in conduct which created a grave risk of death to another person.

To convict of robbery the jury was required to believe all of the following facts:

1. That Davis stole money from the restaurant;
2. That Davis shot the restaurant manager with a deadly weapon; and
3. That, intending to promote or facilitate the robbery, petitioner did counsel, aid, or attempt to aid Davis in the commission of the robbery.

One may not reasonably assume that the jury failed to believe that Davis, who pleaded guilty to murder and armed robbery, shot and killed the manager or that Davis stole money from the restaurant.

As to the facts necessary to prove robbery, as set out above, the jury must have believed numbers 1 and 2. Because the jury did not reach a verdict on the robbery charge, the jury must not have agreed on whether robbery fact 3, above, was proved.

As to the facts necessary to prove murder, as set out above, the jury must have believed only number 2. By virtue of the disagreement as to robbery fact 3, we are compelled to conclude that the jury was unable to agree upon murder fact 1. (The two are identical.) But, because the jury did agree that Petitioner was

not guilty of murder, the jury must have completely agreed that murder fact 3 was not proved; and we must conclude that it was only the failure of the prosecution to prove murder fact 3 which resulted in an acquittal on the murder charge, because of the jury's disagreement as to murder fact 1/robbery fact 3.

Although Petitioner's culpable intent and Petitioner's promoting of the robbery were litigated, the jury could not, yea could not, by virtue of the result of the trial, have determined the extent of the proof thereon. Thus, the Supreme Court of Kentucky was correct in its determination that re-litigation of whether Petitioner promoted, with the requisite intent, the robbery is not violative of Petitioner's rights.

Brown v. *Ohio,* 432 U. S. 161 (1977), is also distinguishable. There, following Brown's conviction for one offense, the prosecution sought to convict Brown of a lesser included offense, every fact of which lesser offense necessarily had been proved at the trial of the greater offense. This Court held that such a second trial was prohibited by the Double Jeopardy Clause. Citing *Blockburger* v. *U.S.,* 284 U. S. 299, 304 (1932), the Court wrote:

> "The applicable rule is that where the same act . . . constitutes a violation of two distinct statutory provisions, the test to be applied . . . is whether each provision requires proof of a fact which the other does not. . . ."

Armed robbery is most certainly not a lesser included offense of murder; and, as seen by the instructions given to the jury at the trial of the case at bar,

the proof of each crime required the proof of a fact which proof of the other crime did not require. In the case at bar, conviction for murder required proof that Petitioner acted wantonly, while robbery had no such requirement; and conviction for robbery required proof that Davis stole money, while murder had no such requirement.

CONCLUSION

For the foregoing reasons Respondent respectfully submits that the Petition must be dismissed.

Respectfully submitted,

ROBERT F. STEPHENS
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Counsel for Respondent

PROOF OF SERVICE

I, C. David Clauss, counsel for Respondent, hereby certify that the foregoing Brief for Respondent was served on Petitioner by depositing three copies in the United States mail, first class postage prepaid, this 11th day of August, 1978, addressed to counsel for Petitioner, Honorable William E. Johnson and Honorable Michael L. Judy, Morehead House, 326 West Main Street, Frankfort, Kentucky 40601.

Assistant Attorney General

APPENDIX

RENDERED: MAY 2, 1978

SUPREME COURT OF KENTUCKY

78-SC-179-MR

DAVID RONZELL JOHNSON - - - - *Appellant*

v.

HENRY MEIGS, Judge, Franklin Circuit Court - *Appellee*

Appeal from the Court of Appeals of Kentucky
78-CA-27-OA

MEMORANDUM OPINION PER CURIAM—
AFFIRMING

An examination of the record discloses that the pin which exploded the balloon of the murder count was the dissatisfaction of at least some members of the jury with the proof of the wantonness of Johnson's conduct. The unanimity of the jury's verdict of not guilty of murder and their inability to agree on any verdict on the robbery count confirms that they made no valid and binding findings on any issues common to the murder and robbery counts. Under these circumstances the double jeopardy clause does not prevent a retrial of the robbery count after declaration of a mistrial. Cf. Turner v. Arkansas, 407 U. S. 366, 369 (1972); Ashe v. Swenson, 397 U. S. 436, 438, 440 n. 4 (1970); Centers v. Commonwealth, Ky., 318 S. W. 2d 57 (1958).

The judgment of the Court of Appeals is affirmed.

All concur.

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COURT OF APPEALS OF KENTUCKY

No. 78-CA-27-OA

DAVID RONZELL JOHNSON - - - - *Petitioner*

v.

HENRY MEIGS, Judge, Franklin Circuit Court - *Respondent*

On Petition for Writ of Prohibition

ORDER DENYING MOTION FOR WRIT OF PROHIBITION

BEFORE: MARTIN, Chief Judge, REYNOLDS and WILHOIT, Judges.

The Court, having considered this original action styled Motion for Writ of Prohibition, and the response thereto, and being otherwise sufficiently advised, ORDERS that the motion be and is hereby DENIED.

ENTERED: February 23, 1978.

/s/ Boyce F. Martin
Judge, Court of Appeals

KENTUCKY REVISED STATUTES

502.020 Liability for conduct of another; complicity

(1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:

(a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or

(b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or

(c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.

(2) When causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense when he:

(a) Solicits or engages in a conspiracy with another person to engage in the conduct causing such result; or

(b) Aids, counsels, or attempts to aid another person in planning, or engaging in the conduct causing such result; or

(c) Having a legal duty to prevent the conduct causing the result, fails to make a proper effort to do so.

HISTORY: 1974 H 232, § 21, eff. 1-1-75

505.040 Effect of former prosecution for different offense

Although a prosecution is for a violation of a different statutory provision from a former prosecution or for a violation of the same provision but based on different facts, it is barred by the former prosecution under the following circumstances:

(1) The former prosecution resulted in an acquittal, a conviction which has not subsequently been set aside, or a determination that there was insufficient evidence to

warrant a conviction, and the subsequent prosecution is for:

(a) An offense of which the defendant could have been convicted at the first prosecution; or

(b) An offense involving the same conduct as the first prosecution, unless each prosecution requires proof of a fact not required in the other prosecution or unless the offense was not consummated when the former prosecution began; or

(2) The former prosecution was terminated by a final order or judgment which has not subsequently been set aside and which required a determination inconsistent with any fact necessary to a conviction in the subsequent prosecution; or

(3) The former prosecution was improperly terminated, as that term is used in subsection (4) of KRS 505.030, and the subsequent prosecution is for an offense of which the defendant could have been convicted had the former prosecution not been improperly terminated.

HISTORY: 1974 H 232, § 46, eff. 1-1-75

FRANKLIN CIRCUIT COURT INSTRUCTIONS

INSTRUCTION No. 1
(Murder)

You will find the defendant guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in Franklin County, Kentucky, on or about the 22nd day of April, 1977, and before the finding of the indictment herein, David Ronzell Johnson voluntarily participated in promoting or facilitating the robbery of Long John Silver's Seafood Shoppe, 166 Versailles Road,

Frankfort, Kentucky, by aiding, counselling, or attempting to aid Dwight Hubert Davis;

(b) That during the course of this robbery and as a consequence thereof, Donald Botts was shot and killed;

AND

(c) That by so participating in that robbery, David Ronzell Johnson was wantonly engaging in conduct which created a grave risk of death to another and that he thereby caused Donald Bott's death under circumstances manifesting an extreme indifference to human life.

The term wantonly as used herein means a defendant acts wantonly with respect to another's death when he is aware of and consciously disregards a substantial and unjustifiable risk that death will occur. In order to be "substantial and unjustifiable" the risk of death must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than twenty (20) years or for life, in your discretion.

Unless you so believe, you will find the defendant not guilty.

INSTRUCTION No. 2
(Robbery)

You will find the defendant, David Ronzell Johnson, guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in Franklin County, Kentucky, on or about the 22nd day of April, 1977, and before the finding of the indictment herein, Dwight Hubert Davis stole a sum of

money from Long John Silver's Seafood Shoppe, 166 Versailles Road, Frankfort, Kentucky;

(b) That in the course of so doing and with intent to accomplish the theft, Dwight Hubert Davis used physical force upon Donald Botts by shooting him with a dangerous instrument, to wit: a pistol;

AND

(c) That the defendant, David Ronzell Johnson, with the intention of promoting or facilitating the robbery aided, counseled, or attempted to aid Dwight Hubert Davis.

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than ten (10) years nor more than twenty (20) years, in your discretion.

Unless you so believe, you will find the defendant not guilty.

INSTRUCTION No. 3

An accomplice is one of two or more persons participating in the commission of a crime, either as a principal actor in its commission or one who is present or nearby and is assisting or encouraging or holding himself in readiness to assist in its commission. If you believe from the evidence that the witness Dwight Davis was an accomplice in the robbery of Long John Silvers Seafood Shoppe or the death of Donald Botts, then you cannot convict the defendant, David Ronzell Johnson, of either offense, on the basis of the testimony of Dwight Davis unless it is supported by other evidence tending to connect the defendant with the commission of the offense in question, and such other evidence is not sufficient for that purpose if it merely shows that such offense was committed by someone and the circumstances under which it was committed. The question of whether the witness, Dwight Davis, was an accomplice is for the jury to determine from the evidence.

INSTRUCTION No. 4

If upon the whole case you have a reasonable doubt as to the defendant's guilt under Instruction No. 1 you shall find him not guilty. The term "reasonable doubt" as used in these instructions means a substantial doubt, a real doubt, in that you must ask yourself not whether a better case might have been proved, but whether, after hearing all the evidence, you actually doubt that the defendant is guilty.

If upon the whole case you have a reasonable doubt as to the defendant's guilt under Instruction No. 2 you shall find him not guilty. The term "reasonable doubt" as used in these instructions means a substantial doubt, a real doubt, in that you must ask yourself not whether a better case might have been proved, but whether, after hearing all the evidence, you actually doubt that the defendant is guilty.

INSTRUCTION No. 5

The verdict of the jury must be unanimous and be signed by one of you as foreman.

You may use one of the forms provided at the end of these instructions in writing your verdict.